92-1328

Supreme Court, U.S.
FILED
FEB 8 1993
OFFICE OF THE CLERK

No.

In The Supreme Court of the United States

October Term 1992

HARVEY GORDON,

Petitioner,

v.

STATE OF FLORIDA, K-MART CORPORATION, DAVID SPARROCK, and PETER MIRAMBEAU,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

APPENDIX

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IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 87-44067 (CA 10)
87-54731 (CA 10)

HARVEY GORDON,

Plaintiff,

vs.

K-MART CORPORATION, DAVID SPARROCK,
and PETER MIRAMBEAU,

Defendants.

FINAL JUDGMENT

Pursuant to the Verdict rendered in this action on July 25, 1989,

IT IS ORDERED AND ADJUDGED:

1. That Plaintiff, HARVEY GORDON, recover from Defendants, K-MART CORPORATION, DAVID SPARROCK, and PETER MIRAMBEAU, jointly and severally, the sum of SEVENTY-TWO THOUSAND FIVE HUNDRED ($72,500.00) Dollars, with costs that shall bear interest at the rate of 12% a year for which let execution issue.

2. That Plaintiff, HARVEY GORDON, also recover from the Defendant, K-MART CORPORATION, as punitive damages, the sum of FIVE HUNDRED THOUSAND ($500,000.00) Dollars, with costs that shall bear interest at the rate of 12% a year for which let execution issue.

3. That Plaintiff, HARVEY GORDON, also recover from Defendant, PETER MIRAMBEAU, as punitive damages, the sum of TWO THOUSAND ($2,000.00) Dollars, with costs that shall bear interest at the rate of 12% a year, for which let execution issue.

4. That Plaintiff, HARVEY GORDON, also recover from Defendant, DAVID SPARROCK, as punitive damages, the sum of TEN THOUSAND ($10,000.00) Dollars, with costs that shall bear interest at the rate of 12% a year, for which let execution issue.

5. That the Court reserves jurisdiction to determine and award the appropriate Cost Judgment(s).

DONE AND ORDERED at the Dade County Courthouse, Miami, Florida, this 27th day of July, 1989.

/s/ Margarita Esquiroz
CIRCUIT COURT JUDGE

Copies furnished to:

Bernard B. Weksler, Esq.
Neil Robertson, Esq.

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NUMBER: 87-44067 CA 10

FILED FOR RECORD
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DADE COUNTY FLORIDA

HARVEY GORDON,

Plaintiff,

vs.

K MART CORPORATION, DAVID SPARROCK
and PETER MIRAMBEAU,

Defendants.

ORDER AMENDING FINAL JUDGMENT

THIS CAUSE having come to be heard on the Defendants' MOTION FOR AMENDMENT OF FINAL JUDGMENT AND FOR PROTECTIVE ORDER AS TO THE DEFENDANTS' BOND and the Court having heard argument of counsel, and being otherwise advised in the Premises, it is hereupon

ORDERED AND ADJUDGED

1. It appearing that the Final Judgment dated July 27, 1989 and recorded on the 28th day of July, 1989, in the Official Records Book No. 14195 at Page 1542 of the Public Records of Dade County, Florida was in error in that it failed to make sixty (60) percent of the punitive damages awarded payable to the State of Florida pursuant to section 768.73, Florida Statutes (1987), the same is hereby amended

nunc pro tunc so that the said Final Judgment shall read as follows:

PURSUANT TO the verdict rendered in this action, it is

ORDERED AND ADJUDGED that the Plaintiff, HARVEY GORDON, recover from the Defendants, K MART CORPORATION, DAVID SPARROCK, and PETER MIRAMBEAU, the sum of TWO HUNDRED SEVENTY-SEVEN THOUSAND THREE HUNDRED AND 00/100 ($277,300.00) with costs to be hereinafter taxed, that shall bear interest at the rate set by Florida Statute for which let execution issue.

Pursuant to section 768.73, Florida Statutes (1987) a judgment is hereby entered in favor of the General Revenue Fund of the State of Florida in the amount of THREE HUNDRED SEVEN THOUSAND TWO HUNDRED AND 00/100 DOLLARS ($307,200.00) which sum represents sixty (60) percent of the punitive damage award.

2. This Court hereby directs the Clerk to amend the Final Judgment accordingly.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida on this 9th day of October, 1990.

/s/ Margarita Esquiroz
CIRCUIT COURT JUDGE

Copies furnished to:

Bernard B. Weksler, Esq.
Neil P. Robertson, Esq.
Craig B. Willis, Esq.

STATE OF FLORIDA, COUNTY OF DADE
I HEREBY CERTIFY that the foregoing is a true and correct copy of the original on file in this office
OCT- 9 1990

CLERK, Circuit and County Courts
By /s/ Alicia Riechmann 5307
Deputy Clerk

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1990

CASE NO. 89-2617

K-MART CORPORATION, etc., et al.,

Appellants,

vs.

HARVEY GORDON,

Appellee.

Opinion filed August 7, 1990.

An Appeal from the Circuit Court for Dade County, Margarita Esquiroz, Judge.

Peters, Pickle, Niemoeller, Robertson, Lax & Parsons and Yvette Rhodes Prescott, for appellants.

Bernard B. Weksler, for appellee.

Before SCHWARTZ, C.J., and NESBITT and GERSTEN, JJ.

PER CURIAM.

Affirmed. See Colonial Stores, Inc. v. Scarbrough, 355 So.2d 1181 (Fla. 1978); Marks v. Mandel, 447 So.2d 1036 (Fla. 3d DCA 1985); Luckie v. Piggly-Wiggly Southern, Inc., 173 Ga.App. 177, 325 S.E.2d 844 (1984); Adams v. Zayre Corp., 148 Ill.App.3d 704, 499 N.E.2d 678 (1986); Krohne v.

Orlando Farming Corp., 102 So.2d 399 (Fla. 2d DCA 1958); H.I. Holding Co. v. Dade County, 129 So.2d 693 (Fla. 3d DCA 1961), cert. denied, 133 So.2d 646 (Fla. 1961); Wackenhut Corp. v. Canty, 359 So.2d 430 (Fla. 1978); Lassiter v. International Union of Operating Engineers, 349 So.2d 622 (Fla. 1976); Fla.R.Civ.P. 1.470(b); Sharpsteen v. Keesler, 178 So.2d 623 (Fla. 3d DCA 1965); see also Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. ——, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989); Davis v. State, 383 So.2d 620 (Fla. 1980).

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1991

CASE NO. 90-2497

HARVEY GORDON,

Appellant,

vs.

STATE OF FLORIDA,
K-MART CORPORATION, etc., et al.,

Appellees.

Opinion filed August 27, 1991.

An Appeal from the Circuit Court for Dade County, Margarita Esquiroz, Judge.

Bernard B. Weksler, for appellant.

Robert A. Butterworth, Attorney General, and Craig B. Willis, Assistant Attorney General; Peters Pickle Niemoeller Robertson Lax & Parsons and Yvette Rhodes Prescott, for appellees.

Roy D. Wasson for Academy of Florida Trial Lawyers as amicus curiae.

Mershon Sawyer Johnston Dunwody & Cole and Edward T. O'Donnell for Product Liability Advisory Council as amicus curiae.

Before SCHWARTZ, C.J., and NESBITT and GERSTEN, JJ.

SCHWARTZ, Chief Judge.

By this decision, we uphold the legislature's authority to allot a portion of a punitive damages award to the state.

I

Harvey Gordon was falsely imprisoned and battered by employees of K-Mart Corporation in an incident which occurred in one of its stores on February 16, 1987. In the ensuing action by Gordon against K-Mart, he recovered a jury verdict for $72,500 in compensatory damages and $512,600 in punitive damages. A final judgment for these amounts was entered in Gordon's favor on July 27, 1989, and post-trial motions were denied on October 5, 1989. Subsequently, in K-Mart Corp. v. Gordon, 565 So.2d 834 (Fla. 3d DCA 1990) (per curiam), the judgment was entirely affirmed.

After the issuance of the mandate, K-Mart, on September 20, 1990, moved to amend the final judgment pursuant to Florida Rule of Civil Procedure 1.540, and the State of Florida moved to intervene as a party plaintiff for the purpose of applying section 768.73(2)(b), Fla. Stat. (Supp. 1986).[1] That section, which was part of the Tort Reform and Insurance Act of 1986, which became effective July 1, 1986, requires that 60% of any punitive damages award be payable either to the Public Assistance Trust Fund

[1]Section 768.73(2)(b) provides:

> If the cause of action was based on personal injury or wrongful death, 60 percent of the award shall be payable to the Public Medical Assistance Trust Fund created in s. 409.2662; otherwise, 60 percent of the award shall be payable to the General Revenue Fund.

or, as in this case, to the General Revenue Fund of the state. On October 9, 1990, the trial court granted these motions and entered the following final judgment *nunc pro tunc* the date of the original judgment:

> PURSUANT TO the verdict rendered in this action, it is ORDERED AND ADJUDGED that the Plaintiff, HARVEY GORDON, recover from the Defendants, K MART CORPORATION, DAVID SPARROCK, and PETER MIRAMBEAU, the sum of TWO HUNDRED SEVENTY-SEVEN THOUSAND THREE HUNDRED AND 00/100 ($277,300.00) with costs to be hereinafter taxed, that shall bear interest at the rate set by Florida Statute for which let execution issue.
>
> Pursuant to section 768.73, Florida Statutes (1987) a judgment is hereby entered in favor of the General Revenue Fund of the State of Florida in the amount of THREE HUNDRED SEVEN THOUSAND TWO HUNDRED AND 00/100 DOLLARS ($307,200.00) which sum represents sixty (60) percent of the punitive damage award.

2. This Court hereby directs the Clerk to amend the Final Judgment accordingly. Gordon now appeals from that portion of the amended judgment which, in effect, transfers $307,200.00 from him to the State of Florida.[1] He raises the dual contentions that section 768.73(2)(b) is unconstitutional and that the manner in which his initial judgment was

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[1]K-Mart has paid the amount of the judgment including the entire punitive award into the registry of the court. The compensatory award and the 40% of the punitive damages to which Gordon is indisputably entitled have been released to him. Accordingly, the only controversy is between Gordon and the state as to the entitlement to the 60% allocation provided by the statute.

amended to reflect the state's recovery was procedurally invalid. We find that neither of these contentions has merit.

II

With all due respect,[3] we find that Gordon's constitutional attacks upon the statute are very insubstantial:

1. *No deprivation of due process right to property.*

The appellant's first claim — that the statute constitutes an unconstitutional "taking" of a property right without due process — is wholly without merit. This is true simply because he has no cognizable, protectable right to the recovery of punitive damages at all. Unlike the right to compensatory damages, see Smith v. Department of Ins., 507 So.2d 1080 (Fla. 1987); University of Miami v. Echarte, ___ So.2d ___ (Fla. 3d DCA Case no. 90-982, opinion filed, June 11, 1991) [16 FLW D1539], the allowance of punitive damages is based entirely upon considerations of public policy. Accordingly, it is clear that th very existence of an inchoate claim for punitive damages is subject to the plenary authority of the ultimate policy-maker under our system, the legislature. In the exercise of that discretion, it may place conditions upon such a recovery or even abolish it altogether. Ross v. Gore, 48 So.2d 412 (Fla. 1950); cf. Pacific Mutual Life Ins. Co. v. Haslip, ___ U.S. ___, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). As our court clearly stated in *Ross*:

> As to question No. 1, plaintiff contends that the statute has "changed the amount of damages recoverable, and thus has unconstitutionally

[3]We have noticed that this phrase is almost always employed, as it is here, when very little, if any, respect is actually deemed "due" to the contention or institution to which it is directed.

> impaired appellant's rights." There is no merit to this contention. As to the denial of "punitive damages," such damages are allowed, not as compensation to a plaintiff, but as a deterrent to others inclined to commit a similar offense, and their allowance depends on malice, moral turpitude, wantonness or outrageousness of tort. Dr. P. Phillips & Sons, Inc., v. Kilgore, 152 Fla. 578, 12 So.2d 465. The right to have punitive damages assessed is not property; and it is the general rule that, until a judgment is rendered, there is no vested right in a claim for punitive damages. Kelly v. Hall et al., 191 Ga. 470, 12 S.E.2d 881; Osborn v. Leach, 135 N.C. 628, 47 S.E. 811. It cannot, then, be said that the denial of punitive damages has unconstitutionally impaired any property rights of appellant.

Ross, 48 So.2d at 414; accord Louisville & Nashville R.R. v. Street, 164 Ala. 155, 51 So. 306 (1909); Smith v. Hill, 12 Ill.2d 588, 147 N.E.2d 321 (1958).

In addition, because the incident in question, much less the entry of the final judgment, occurred subsequent to the effective date of the statute, the case is governed also by the rules that (a) where an existing statute provides that funds recovered under it are subject to a prior claim, a party cannot thereafter obtain a vested right to that claim, see United States Fidelity & Guar. Co. v. Department of Ins., 453 So.2d 1355 (1984), and that (b) even substantive rights and obligations created by statute do not vest until the accrual of the cause of action which gives rise to them. L. Ross, Inc. v. R. W. Roberts Const. Co., 466 So.2d 1096 (Fla. 5th DCA 1985), aff'd, 481 So.2d 484 (Fla. 1986). For all these reasons, we summarily reject the contention that the state has invalidly taken a property right of the plaintiff. *Ross*, 48 So.2d at 412.

2. *No violation of substantive due process rights.*

We find Gordon's alternative contention that section 768.73(2)(b) is "arbitrary" and "unreasonable" and therefore somehow deprives him of his rights to substantive due process on that basis even less persuasive. To successfully surmount such an objection, it need only be shown that the statute under attack bears a rational relation to a legitimate legislative interest or objective. Abdala v. World Omni Leasing, Inc., ____ So.2d ____ (Fla. Case nos. 75,966 & 75,968, opinion filed, June 27, 1991) [16 FLW S464]; Vildibill v. Johnson, 492 So.2d 1047 (Fla. 1986). At least two such bases of 768.73(2)(b) are readily apparent:

(a) it is clear that the present statute[4] is founded upon and directly serves one of the most basic justifications for the existence of punitive damages in the first place: to serve as punishment for what amounts to a public wrong and thus to protect the public by inhibiting future such conduct. Ingram v. Pettit, 340 So.2d 922, 924 (Fla. 1976) ("It has long been established that the availability of punitive damages is reserved to those kinds of cases where private injuries partake of public wrongs. The intentional infliction of harm, or a recklessness which is the result of an intentional act, authorize punishment which may deter future harm to the public by the particular party involved and by others acting similarly."); Florida Southern R.R. v. Hirst, 30 Fla. 1, 11 So. 506 (1892); 22 Am.Jur.2d Damages § 734 (1988) ("The intentional or reckless infliction of harm may be likened to culpable negligence in criminal cases and authorizes the infliction of punishment which may deter future harm to the public. So viewed, punitive damages are allowed on grounds of public policy and in the interest of society and for the

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[4]Several other states have enacted similar statutes. See Colo. Rev. Stat. § 13-21-102(4) (1987); Ga. Code Ann. § 51-12-5.1(e)(2) (Supp. 1987); Ill. Rev. Stat. Ch. 110, para. 2-1207 (Supp. 1987); Iowa Code Ann. § 668A.1(2)(b) (West Supp. 1987); Mo. Stat. Ann. § 537.675 (1987).

public benefit."). The allotment of a portion of these funds directly to the State as a representative of the public whose interest the award is thus largely designed to serve, may obviously have been viewed by the legislature as an appropriate means of effecting that legitimate purpose.[5] We agree with the thrust of Justice Shores's opinion in Fuller v. Preferred Risk Life Ins. Co., 577 So.2d 878, 886-87 (Ala. 1991) (Shores, J., concurring specially), that, on this basis, the courts may make such an allocation even in the absence of statutory authorization:

> If the court concludes that the amount is not so excessive as to deprive the defendant of his property in contravention of § 13, Ala. Constitution 1901, it nevertheless may also determine that it would be in the best interest of justice to require the plaintiff to accept less than all of the amount and to require the defendant to devote a part of the amount to such purposes as the court may determine would best serve the goals for which punitive damages are allowed in the first place: vindication of the public and deterrence to the defendant and to others who might commit similar wrongs in the future.
>
> * * *
>
> The courts, however, have inherent authority to allocate punitive damages, with jurisdiction over both plaintiff and defendant, by reducing the amount that the plaintiff is to receive to less than the full amount of the verdict, and directing the defendant to pay a part of a punitive damages

[5]Of course, since the legislature could have abolished the punitive damage claim altogether, or under this rationale, required that *all* of the award be payable to the state, the plaintiff can hardly complain that the determination that 60% (as opposed to 30% or 90%) was inappropriate.

award to the state general fund or any special fund devoted to the furtherance of justice on behalf of all the people. To do so in proper cases could serve the purpose for which punitive damages were authorized to a greater degree than would allowing the plaintiff to receive the entire amount.

Fuller, 577 So.2d at 886-87.

(b) The legislative history indicates that one reason for the provision in question was to discourage punitive damages claims by making them less remunerative to the plaintiff and his attorneys. See § 768.73(4), Fla. Stat. (Supp. 1986).[6], [7] Since the legislature had every right to conclude, as a matter of public policy, that such suits *should* be

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[6]Section 768.73(4) provides:

Claimant's attorney's fees, if payable from the judgment, shall, to the extent that they are based on the punitive damages, be calculated based only on the portion of the judgment payable to the claimant as provided in subsection (2). Nothing herein shall be interpreted as limiting the payment of attorney's fees based upon the award of damages other than punitive damages.

[7]Because he is not a party to this controversy, see Warshaw-Seattle, Inc. v. Clark, 85 So.2d 623 (Fla. 1955), we do not consider here the personal claim of Gordon's attorney that the statutory scheme invalidly interferes with his rights under his fee contract with his client. But see Gamble v. Wells, 450 So.2d 850 (Fla. 1984), which is directly contrary to this contention.

Without expressing any opinion on the issue, however, we note the possibility of a separate quantum meruit claim by the attorney *against the state* for the services rendered in recovery of the 60% of the punitive damages on its behalf. See Government Employees Ins. Co. v. Graff, 327 So.2d 88 (Fla. 1st DCA 1976); *Fuller*, 577 So.2d at 886-87 (Shores, J., specially concurring).

discouraged — even eliminated — this affords a perfectly legitimate ground for upholding the statute.[8], [9]

III

Turning to the procedural objections to the effectuation of the statute by substituting the state for Gordon as to $307,200.00 of the punitive damages award, we also find no merit.

1. First, it is clear that the trial judge properly exercised her discretion, even after judgment, to permit the state to intervene as a plainly interested party plaintiff. Wags Transp. System v. City of Miami Beach, 88 So.2d 751 (Fla. 1956).

2. The amendment to the initial judgment, to reflect the clear and mandatory terms of a controlling statute, was properly effected to correct "an error therein arising from oversight" under Florida Rule of Civil Procedure 1.540(a),[10] see Stuckey v. Northern Propane Gas Co., 874 F.2d 1563

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[8]We relegate to a footnote the claim that Gordon obtained a constitutionally vested right to 100% of the punitive damages when the initial judgment for that amount was entered in his favor. Because that judgment was obviously erroneously entered as in contravention of a contrary statute, this contention is equivalent to stating that no judgment may constitutionally be corrected or reversed on appeal.

[9]In deciding that § 768.73(2)(b) is valid, we have not overlooked McBride v. General Motors Corp., 737 F.Supp. 1563 (M.D. Ga. 1990). We find its brief discussion of the present issue, 737 F.Supp. at 1578, completely unpersuasive.

[10]This was the view correctly adopted by the trial judge below:

> THE COURT: I don't think this is a clerical mistake. I think it's a mistake on my part but not a clerical one, in other words in typing. I did not miswrite anything or whoever prepared the order did not miswrite anything.

(Footnote continued on next page)

(11th Cir. 1989) (verdict corrected to properly apportion damages according to Georgia law); United States v. Griffin, 782 F.2d 1393 (7th Cir. 1986) (interest rate in judgment correctable after property sold at auction); O'Tell v. New York, New Haven & Hartford R.R., 236 F.2d 472 (2nd Cir. 1956) (judgment amended to reflect deduction from damages of sum plaintiff received for executed release; omitted in jury charge prior to verdict); First Nat'l Bank v. National Airlines, Inc., 167 F.Supp. 167 (S.D.N.Y. 1958) (judgment overlooking statute awarding costs upon dismissal of suit amendable), or to correct a plain "mistake" under Florida Rule of Civil Procedure 1.540(b).[11] See Taylor v. United States, 821 F.2d 1428 (9th Cir. 1987) (government did not waive claim to statutory limitation on non-economic damages for professional negligence where it failed to assert it prior to judgment), cert. denied, 485 U.S. 992, 108 S.Ct. 1300, 99 L.Ed.2d 510 (1988); Federal Deposit Ins. Corp. v. Castle, 781 F.2d 1101 (5th Cir. 1986) (retroactive social security benefits subject to statutory limitation asserted for first time in Rule 60(b) motion); Meadows v. Cohen, 409 F.2d 750, 753 (5th Cir. 1969) (trial court properly amended judgment under Fed. R. Civ. P. 60(b) to statutorily limit disability benefit government had failed to bring to trial judge's attention).

Finally, the court properly proceeded under 1.540 notwithstanding our affirmance of the earlier judgment,

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(Footnote continued from previous page)

It was an oversight in the sense that I did not realize that it was meant to be interpreted that it would exclude the statute. And that was not my intention in any way, shape or form, you know. So it was an oversight on my part in that regard.

[11]The 1.540 motion was timely under either 1.540(a), which provides that it may be invoked "at any time," or under 1.540(b), since it was filed within a year after the denial of the post-trial motions. See Pruitt v. Brock, 437 So.2d 768 (Fla. 1st DCA 1983). See generally Franklin v. Franklin, 573 So.2d 401 (Fla. 3d DCA 1991).

Ohio Casualty Group v. Parrish, 350 So.2d 466 (Fla. 1977); Avant v. Waites, 295 So.2d 362 (Fla. 1st DCA 1974),[12] and without obtaining this court's permission to do so. *Ohio Casualty*, 350 So.2d at 466.

Affirmed.[13]

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[12]We therefore deny Gordon's motion to enforce the prior mandate in the original appeal, case no. 89-2617.

[13]We certify to the Supreme Court that this case involves a question of great public importance as to the constitutionality of § 768.73(2)(b), Fla. Stat. (Supp. 1986).

SUPREME COURT OF FLORIDA

No. 78,638

HARVEY GORDON,

Petitioner,

vs.

STATE OF FLORIDA, et al.,

Respondents.

[November 12, 1992]

PER CURIAM.

We review a question certified to be of great public importance: whether sub-section 768.73 (2)(b), Florida Statutes (Supplement 1986), is constitutional. *Gordon v. State*, 585 So.2d 1033, 1038 n.13 (Fla. 3d DCA 1991). We have jurisdiction. Art. V, § 3(b)(4), Fla. Const.

Harvey Gordon was falsely imprisoned and battered by employees of K-mart Corporation in an incident in one of its stores on February 16, 1987. Gordon recovered a jury verdict against K-Mart for $72,500 in compensatory damages and $512,600 in punitive damages, which was affirmed on appeal. *K-Mart Corp. v. Gordon*, 565 So. 2d 834 (Fla. 3d DCA 1990). After the mandate was issued, K-Mart, on September 20, 1990, moved to amend the final judgment pursuant to Florida Rule of Civil Procedure 1.540, and the State moved to intervene to assert its interest in sixty percent of the punitive damages award pursuant to subsection 768.73(2)(b), Florida Statutes (Supplement 1986), which provides:

> If the cause of action was based on personal injury or wrongful death, 60 percent of the award shall be payable to the Public Medical Assistance Trust Fund created in s. 409.2662; otherwise, 60 percent

> of the award shall be payable to the General Revenue Fund.

This provision became effective on July 1, 1986, as part of the Tort Reform and Insurance Act of 1986. Ch. 86-160, §§ 52, 70, Laws of Fla. The district court upheld the trial court's award to the State. *Gordon v. State*, 585 So. 2d 1033 (Fla. 3d DCA 1991). Gordon contends that subsection (2) is unconstitutional. Gordon's attorneys contend that subsection 768.73(4), Florida Statutes (Supplement 1986), also is unconstitutional. We disagree and approve the decision below.

As the district court noted:

> [Gordon] has no cognizable, protectable right to the recovery of punitive damages at all. Unlike the right to compensatory damages, the allowance of punitive damages is based entirely upon considerations of public policy. Accordingly, it is clear that the very existence of an inchoate claim for punitive damages is subject to the plenary authority of the ultimate policy-maker under our system, the legislature. In the exercise of that discretion, it may place conditions upon such a recovery or even abolish it altogether.

Gordon, 585 So. 2d at 1035-36 (citations omitted). This Court said in *Ross v. Gore*, 48 So. 2d 412, 414 (Fla. 1950):

> The right to have punitive damages assessed is not property; and it is the general rule that, until a judgment is rendered, there is no vested right in a claim for punitive damages. It cannot, then, be said that the denial of punitive damages has unconstitutionally impaired any property rights of appellant:

(Citations omitted.) The incident here occurred subsequent to the effective date of the statute and thus the award clearly is governed by the statute.

We agree with the trial court that no substantive due process violation occurred. The statute under attack here bears a rational relationship to legitimate legislative objectives: to allot to the public weal a portion of damages designed to deter future harm to the public and to discourage punitive damage claims by making them less remunerative to the claimant and the claimant's attorney.

We also have considered the other constitutional claims raised and suffice it to say that the statute does not violate the right to trial by jury, does not constitute a tax on judgments, does not deny equal protection and is not a special law.

We further agree that the trial court's amendment to the initial judgment was proper because Florida Rule of Civil Procedure 1.540(b) authorizes relief from judgment based on "mistake" or "inadvertence," if the motion is made "not more than one year after the judgment." We approve *Pruitt v. Brock*, 437 So. 2d 768 (Fla. 1st DCA 1983) (holding that the one-year limit of rule 1.540(b) runs from the disposition of a timely-filed motion for rehearing). Although judgment in this case was entered on July 27, 1989, posttrial motions were not denied until October 5, 1989. The rule 1.540 motion was filed on September 20, 1990.

We moreover find no merit to counsel's claim that subsection 768.73(4), providing that attorney's fees, "if payable from the judgment, shall, to the extent that they are based on the punitive damages, be calculated based only on the portion of the judgment payable to the claimant." Valid laws in effect at the time a contract is made enter into and become part of the contract as if expressly incorporated into

the contract. *State ex rel. Select Tenures, Inc. v. Raulerson*, 129 Fla. 346, 176 So. 270 (1937). Gordon's cause of action accrued after the effective date of section 768.73 and the contingent fee contract was entered into after the statute went into effect; hence the statute did not impair any preexisting contractual rights of Gordon's attorney.

Accordingly we answer the question certified in the affirmative and approve the decision of the district court.

It is so ordered.

BARKETT, C.J., and OVERTON, McDONALD, GRIMES, KOGAN and HARDING, JJ., concur.

SHAW, J., concurs in part and dissents in part with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Shaw, J., concurring and dissenting.

I agree that subsection 768.73(4) is constitutional. I cannot agree that subsections 768.73(2) and (5) are constitutional.

This Court has said that "[w]hen the right to collect money under the terms of a decree has vested, it is not within the province of a court to divest such right." *Blocker v. Ferguson*, 47 So. 2d 694, 698 (Fla. 1950). We have noted that "[i]t is also well settled that the judgment of an appellate court, where it issues a mandate, is a final judgment in the cause and compliance therewith by a lower

court is a purely ministerial act."[1] *O.P. Corp. v. Village of N. Palm Beach*, 302 So. 2d 130, 131 (Fla. 1974). Mr. Gordon had a vested property right by the time the State intervened to claim its lion's share of the punitive damage award.

We said in *Department of Law Enforcement v. Real Property*, 588 So. 2d 957, 960 (Fla. 1991):

> The basic due process guarantee of the Florida Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law." Art. I, § 9, Fla. Const. Substantive due process under the Florida Constitution protects the full panoply of individual rights from unwarranted encroachment by the government. To ascertain whether the encroachment can be justified, courts have considered the propriety of the state's purpose; the nature of the party being subjected to state action; the substance of the individual's right being infringed upon; the nexus between the means chosen by the state and the goal it intended to achieve; whether less restrictive alternatives were available; and whether individuals are ultimately being treated in a fundamentally unfair manner in derogation of their substantive rights.

The encroachment here is unjustified under this standard.

Our sister court, in *Kirk v. Denver Publishing Co.*, 818 P.2d 262 (Colo. 1991), held that a similar statute (giving one-third of a judgment for exemplary damages to the state general fund) unconstitutional. It found the statute to be a forced taking of property unrelated to any constitutionally

---

[1]The final judgment in this case was affirmed by the district court on August 7, 1990, and the mandate issued on September 19, 1990, before the State's post-judgment intervention.

permissible governmental interest and, therefore, violative of the federal and state constitutional proscriptions against taking private property without just compensation. The court said:

> In our view, forcing a judgment creditor to pay to the state general fund one-third of a judgment for exemplary damages in order to fund services which have already been funded by other revenue-raising measures, and without conferring on the judgment creditor any benefit or service not furnished to other civil litigants not required to make the same contribution, amounts to an unconstitutional taking of the judgment creditor's property in violation of the Taking Clause of the United States and the Colorado Constitutions.

Id. at 272. The court noted that this is particularly true where "the judgment itself results exclusively from the judgment creditor's time, effort, and expense in the litigation process without any assistance whatever from the state." *Id.* The court also found significant "the absence of any demonstrable nexus between, on the one hand, any alleged governmental interest in punishing and deterring . . . tortious conduct and, on the other, the statutory imposition of the forced contribution on the person injured by the wrongful conduct." *Id.* at 273. I find these observations equally pertinent here: the State did nothing to earn its sixty-percent share of the punitive damage award; and a nexus between deterrence and the forced contribution from the injured person is absent.

The United States Supreme Court held unconstitutional, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), a Florida statute giving $100,000 in interest accruing on moneys placed in the

registry of the court to counties as a fee for using the courts.[2] It said:

> Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as "public money" . . . . . [A] State, by *ipse dixit*, may not transform private property into public property without compensation . . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against arbitrary use of governmental power.

Id. at 164. The court held constitutional, by contrast, a federal statute deducting one and one-half percent from the first five million dollars of an arbitration award entered by a federal claims tribunal, as reimbursement for administrative expenses. *United States v. Sperry Corp.*, 110 S. Ct. 387 (1989). The court declined to define what percentage of an award would be "too great a take" because it found that "by any standard of excessiveness," one and one-half percent was not too great. *Id.* at 395. I agree that one and one-half percent of a limited portion of an award is not a taking; the instant statute, by contrast, is "too great a take" "by any standard of excessiveness," and, therefore, a taking.

I also view section 768.73(5), Florida Statutes (Supplement 1886), as constitutionally infirm, because it contravenes our state constitutional guarantee of the right to trial by jury. Our constitution provides: "The right of trial by jury shall be secure to all and remain inviolate." Art. I,

---

[2]The unconstitutional statute, in relevant part, provided: "All interest accruing from moneys deposited shall be deemed income of the office of the clerk of the circuit court investing such moneys . . . ." § 28.33, Fla. Stat. (1973).

§ 22, Fla. Const. It is the jury's function to determine the amount of damages, including punitive damages, to be awarded in this case. *See Barry v. Edmunds*, 116 U.S. 550, 565 (1886) ("[N]othing is better settled than that, in such cases as [intentional torts], and other actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict."). The statutory mandate to keep secret from the jury the State's sixty-percent take of the punitive damage award prevents the jury from performing its proper function. Moreover, when information essential to the jury's determination of damages is kept from it, due process is denied, in violation of our state and federal constitutions. Art. I, § 9, Fla. Const.; U.S. Const. amend. XIV.

For these reasons I dissent.

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NUMBER: 87-44067 CA 10

HARVEY GORDON,

Plaintiff,

vs.

K MART CORPORATION, DAVID SPARROCK
and PETER MIRAMBEAU,

Defendants.

MOTION FOR AMENDMENT OF FINAL
JUDGMENT AND FOR PROTECTIVE ORDER
AS TO THE DEFENDANTS' BOND
Florida Bar No. 287180

COME NOW the Defendants, K MART CORPORATION, DAVID SPARROCK, and PETER MIRAMBEAU, by and through their undersigned counsel, and move that this court enter an order amending the Final Judgment to comply with Florida Statute 768.73(2)(b) and protecting the Defendants from execution either on the judgment or the appeal bond in violation of the above-referenced statute, and as grounds would state the following:

1. The jury returned a verdict in this cause which included an award of punitive damages in the amount of FIVE HUNDRED TWELVE THOUSAND AND 00/100 DOLLARS ($512,000.00).

2. Section 768.73, Florida Statutes (1989) provides in relevant part that in any civil action, other than an action based on personal injury or wrongful death, where an award

of punitive damages is made sixty (60) percent of the award *shall be made payable* to the State General Revenue Fund.

3. The Final Judgment entered in this cause did not make sixty (60) percent of the punitive damage award payable to the General Revenue Fund. Accordingly, Defendants request that this Court enter an order, pursuant to Fla.R.Civ.P. 1.540(a), amending the final judgment entered in the cause so that it comports with the requirements of section 768.73.

4. Defendants brought an appeal from the final judgment, which this Court affirmed. *K-Mart v. Gordon*, 15 F.L.W. D2020 (Fla. 3d DCA Aug. 7, 1990). Rehearing was denied on September 6. On September 13, Defendants moved to stay the Mandate pending further review of this case by the United States Supreme Court; however, the Mandate was issued on September 19, 1990.

5. In anticipation of having to satisfy the final judgment should the judgment be ultimately affirmed, counsel for Appellant contacted Insurance Commissioner Tom Gallagher and other State officials regarding the proper procedure to be followed in order to comply with section 768.73.

6. Attached hereto is a letter from Mr. Gallagher delineating the procedures to be followed in making this payment to the State and stating that said obligation to make to make payment is the responsibility of the Defendants.

7. Counsel then forwarded a copy of Mr. Gallagher's letter to Plaintiff's counsel to advise him of the procedures required.

8. Attached hereto is an August 28, 1990 letter from Plaintiff's counsel indicating the Plaintiff's personal belief of the unconstitutionality of section 768.73 and making threats against the Defendants should the Defendants refuse to comply with the Statute, which has not been found unconstitutional.

9. Attached hereto is a letter dated September 17, 1990 from Plaintiff's counsel to the surety of Defendants' supersedeas bond wherein he demands full payment of the final judgment within seven (7) days and a letter to Defendants' counsel threatening further action against the supersedeas bond evne [sic] though the Court continues to have jurisdiction in this cause.

WHEREFORE, the Defendants would request that this Court enter an order amending the final judgment and protecting Defendants from execution on either the final judgment of the supersedeas bond and delineating the relative responsibilities and duties of the parties with regards to Florida Statute 768.73 (2)(b).

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to Bernard Weksler, Esquire, Attorney for Plaintiff, 522 Gables International Plaza, 2655 LeJeune Road, Coral Gables, Florida 33134 on this 20th day of September, 1990.

PETERS, PICKLE, NIEMOELLER,
ROBERTSON, LAX & PARSONS
Attorneys for Defendants
Suite 628 Ingraham Building
25 Southeast 2nd Avenue
Miami, Florida 33131
(305) 374-3103

By:/s/ Neil P. Robertson
NEIL P. ROBERTSON

YRP/me
9/20/90
KMA89030

IN THE CIRCUIT COURT OF
THE ELEVENTH JUDICIAL
CIRCUIT, IN AND FOR DADE
COUNTY, FLORIDA

CASE NO. 87-44067 CA 10

RECEIVED
OCT-9 1990
BERNARD B. WEKSLER

HARVEY GORDON,

Plaintiff,

-vs-

K-MART, SPARROCK & MIRAMBEAU,

Defendants.

STATE OF FLORIDA'S PETITION TO INTERVENE

COMES NOW the State of Florida, by and through undersigned counsel, and hereby petitions the Court for permission to intervene and assert its rights pursuant to § 768.73, Fla.Stat., and as grounds therefor states as follows:

1. Section 768.73(2)(b), Fla. Stat., requires that in any civil action, 60 percent of any award of punitive damages shall be made payable to either the Public Medical Assistance Trust Fund or the General Revenue Trust Fund, depending upon the nature of the cause of action.

2. The Department of Health and Rehabilitative Services is the state agency responsible for administering the Public Medical Assistance Trust Fund (PMATF) created pursuant to Section 409.266, Florida Statutes.

3. In the present case, according to information available to the State, the jury returned an award of punitive

damages, 60 percent of which would be $307,200. The cause of action was apparently based upon personal injury.

4. The Final Judgment entered in this case did not make 60 percent of the punitive damage award payable to the PMATF, as provided by statute.

5. The State, in order to protect and defend its statutory rights, seeks intervention because its interest in this litigation is of such direct and immediate character that it will either gain or lose by direct legal operation and effect of the judgment if it is not permitted to intervene. *Citibank, N.A. v. Blackhawk Heating & Plumbing Co., Inc.*, 398 So.2d 984 (Fla. 1981); *appeal after remand*, 478 So.2d 76 (Fla. 4th DCA 1985).

WHEREFORE, the State of Florida hereby seeks intervention because of its direct interest in this litigation.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

/s/ Craig B. Willis

CRAIG B. WILLIS
Assistant Attorney General
Florida Bar No. 0257656

DEPARTMENT OF LEGAL AFFAIRS
The Capitol, Suite 1601
Tallahassee, FL 32399-1050
(904) 488-8253

COUNSEL FOR INTERVENOR

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing STATE OF FLORIDA'S PETITION TO INTERVENE has been furnished to NEIL P. ROBERTSON and YVETTE PRESCOTT, Peters, Pickle, Niemoeller, Robertson, Lax & Parsons, Suite 628 Ingraham Building, 25 S.E. 2nd Avenue, Miami, Florida 33131-1691, Counsel for Defendants; and to BERNARD B. WEKSLER, 2655 Le Jeune Road, 522 Gables International Plaza, Coral Gables, Florida 33134, Counsel for Plaintiff, by U. S. Mail this 4th day of October, 1990.

/s/ Craig B. Willis
CRAIG B. WILLIS

RECEIVED
OCT 10 1990
BERNARD B. WEKSLER

IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY,
FLORIDA

GENERAL JURISDICTION DIVISION

CASE NUMBER: 87-44067 CA 10

HARVEY GORDON,

Plaintiff,

vs.

K-MART CORPORATION, DAVID SPARROCK and
PETER MIRAMBEAU,

Defendants.

ORDER GRANTING STATE
OF FLORIDA'S PETITION
TO INTERVENE

THIS CAUSE having come to be heard on October 9, 1990, on the STATE OF FLORIDA'S PETITION TO INTERVENE, and the Court having heard argument of counsel and the STATE OF FLORIDA and being duly advised in the premises does hereby

ORDERED AND ADJUDGED that said Motion is GRANTED.

DONE AND ORDERED in Miami, Dade County, Florida this 9th day of October, 1990.

JUDGE MARGARITA ESQUIROZ
CIRCUIT COURT JUDGE

Copies Furnished to:

Neil Robertson, Esq.
Bernard Weksler, Esq.
Craig Willis, Esq.

AUG 20 1990

OFFICE OF THE TREASURER
DEPARTMENT OF INSURANCE
Division of Risk Management,
Larson Building, G-71
Tallahassee, Florida 32399-0300

TOM GALLAGHER
TREASURER
INSURANCE COMMISSIONER
FIRE MARSHAL

August 17, 1990

Mr. Neil P. Robertson
Peters, Pickle, Niemoeller,
Robertson, Lax & Parsons
Suite 628 Ingraham Building
25 S.E. 2nd Avenue
Miami, Florida 33131-1691

Dear Mr. Robertson:

I have reviewed your letter of August 8, 1990, inquiring as to any procedures your firm would need to follow in complying with Florida Statutes 768.73(2)(b). After checking with our departmental staff, I have learned that Attorney Craig Willis at the Attorney General's office has been handling these matters for the State. He can be contacted at (904) 488-8253.

Past procedure has been for the defendant's law firm to contact the Attorney General's office to arrange for payment. The payment will need to be sent to the State Comptroller's office, and Joan Levin is the contact person in that office who handles these matters. The payment will need to be payable to the Public Medical Assistance Trust Fund or the State of Florida, depending on the type of litigation involved, and in this respect you should contact Mr. Willis to advise him of the nature of the judgement award.

The Comptroller's office will provide your client with a receipt and release, which should act to satisfy your client's responsibilities under the statute. The Attorney General's office advises that a satisfaction of judgement would not be appropriate since the State of Florida was not a party to the litigation.

I hope this information will be of benefit to you. The Attorney General's office advised that they received their copy of your letter and are ready to work with your firm in processing this matter.

Sincerely,

/s/ Tom Gallagher

Tom Gallagher
Treasurer and
Insurance Commissioner

TG-C/w

cc: R. J. Castellanos, Director
Division of Risk Management

IN THE CIRCUIT COURT
OF THE 11TH JUDICIAL
CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 87-44067 (CA 10)

FL BAR NO.: 086117

HARVEY GORDON,

Plaintiff,

vs.

K-MART CORPORATION, DAVID SPARROCK and PETER MIRAMBEAU,

Defendants.

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR AMENDMENT OF FINAL JUDGMENT, ETC.

COMES NOW the Plaintiff, HARVEY GORDON, by and through his undersigned counsel, and moves this Court to deny the Defendants' Post Appeal Motions, including the Motion to Amend Final Judgment, and says:

* * *

19. In the event the State of Florida feels that it is entitled to any part of the punitive damages awarded to the Plaintiff, the State of Florida may institute or initiate any action which it may deem appropriate or proper. The Plaintiff will then have the opportunity to contest the validity and constitutionality of *Florida Statute* §768.73.

20. The State of Florida is not a party in this cause, and has not attempted to intervene in this cause. Therefore,

the State of Florida should not be permitted to do so indirectly by the actions of the Defendants.

WE DO HEREBY CERTIFY that a true and correct copy of the foregoing was hand-delivered this 9th day of October, 1990 to Neil P. Robertson, Esq., PETERS, PICKLE, et al., Attorneys for the Defendants, 628 Ingraham Building, 25 Southeast Second Avenue, Miami, Florida 33131.

BERNARD B. WEKSLER, ESQ.
Attorney for Plaintiff
522 Gables International Plaza
2655 Le Jeune Road
Coral Gables, Florida 33134
(305) 446-2826

By: /s/ Bernard B. Weksler
BERNARD B. WEKSLER

IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY,
FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 87-44067 (CA 10)

HARVEY GORDON,

Plaintiff,

vs.

K-MART CORPORATION, et al.,

Defendants.

Proceedings had in the above-entitled matter before the Honorable MARGARITZ ESQUIROZ, Dade County Courthouse, Miami, Florida, October 9, 1990, beginning at or about 2:30 P.M.

APPEARANCES:

BERNARD B. WEKSLER, ESQ. and
KAREN HAAS, ESQ.
On behalf of Plaintiff

PETERS, PICKLE, NIEMOELIER,
ROBERTSON, LAX & PARSONS
By NEIL P. ROBERTSON, ESQ. and
YVETTE RHODES PRESCOTT, ESQ.
On behalf of Defendant

JODY E. COLLINS, ESQ. and
RICHARD F. SCOTT, ESQ.
On behalf of State of Florida

— — — — — —

* * *

MR. WEKSLER: It's too late for them to intervene anyway. The final judgment has been entered by the court. It's been affirmed by the appellate court.

THE COURT: But they had no stake in the matter before punitive damages were awarded. That's the only time they have any stake in this.

MR. WEKSLER: Your Honor, they had an opportunity to come in at the time the court entered the final judgment. They had an opportunity to come in after that time. They could have filed a response before the matter went up to the appellate court. They could have intervened in the appellate court. They have not done so.

And to come in at this late stage I don't see how they can go ahead and do anything at this late stage. If they want to go ahead with an independent action that might be something else, but I don't see how they can go ahead and intervene and try to change a final judgment which has been affirmed by the appellate court. That's what they would be trying to do when they intervene is have you change the final judgment.

. . . .

MS. COLLINS: Actually there's an error in the motion, and it goes to the general revenue fund.

THE COURT: Okay, the general revenue fund. How could I fail to follow the law even if the State of Florida was not a party to this?

. . . .

MR. WEKSLER: Judge, she still hasn't shown you any law where they're able to intervene after the final judgment. And I might add the reason why I talk about a separate lawsuit is because we would be contesting the constitutionality of the statute. And that would be something we would be testing with them.

* * *

MR. WEKSLER: If the state of Florida thinks that they may have some sort of claim to this, then let them go ahead with some sort of a separate action against Harvey Gordon and claiming that they're entitled to it. And at that time we can go into the issue of the constitutionality of the statute. But the State of Florida sat back all this time.

K-Mart sat — was well aware of this statute. It sat back. The only time it even attempted to modify the final judgment —

THE COURT: Let me ask you something, Mr. Weksler. Where in the law does it say that the State of Florida has to be a party to the litigation or be allowed to intervene or be there to assert its rights? In other words where does it say that the court does not have to apply this statute even if the state is not here?

MR. WEKSLER: The statute does not talk about what the procedure is to follow —

THE COURT: Obviously.

MS. PRESCOTT: That's why we're here.

. . . .

* * *

MR. WEKSLER: I'll tell you what the trial court did. And I don't see how they can come in at this late — because what's going to happen, they come on and intervene. Are we supposed to go ahead and file an answer and raise constitutional issues, and then you're litigating?

* * *

MR. WEKSLER: We're going to be taking up the constitutionality of the statute, and they're going to be paying twice.

* * *

MR. WEKSLER: Well, procedurally if the court is going to go ahead and say that you have the right to let them intervene, I would then proceed to file appropriate motions here in the court, if this court would be the court here contesting the constitutionality of the statute. See --

THE COURT: That's fine.

* * *

CERTIFICATE

STATE OF FLORIDA)
) ss.
COUNTY OF DADE)

I, EILEEN J. WILEY, RPR-CM, Notary Public in and for the State of Florida at Large, do hereby certify that I reported in shorthand the hearing before the HONORABLE MARGARITA ESQUIROZ, Circuit Judge, and the foregoing pages, numbered 1 to and including 40, constitute a true and correct record thereof.

I further certify that I am not of counsel, not related to nor employed by any attorney in this suit, and not financially interested in the outcome thereof.

DATED at Miami, Dade County, Florida, this 16th day of October, 1990.

/s/ Eileen J. Wiley
EILEEN J. WILEY, RPR-CM
Notary Public,
State of Florida at Large.

My Commission Expires: 1/6/93

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CASE NO.: 90-02497

LOWER TRIBUNAL CASE NO.: 87-44067

HARVEY GORDON,

Appellant,

vs.

K-MART CORPORATION, a Michigan Corporation authorized to do business in the State of Florida, DAVID SPARROCK, and PETER MIRAMBEAU,

Appellees.

INITIAL BRIEF OF APPELLANT

BERNARD B. WEKSLER, ESQ.
Attorney for Appellant
522 Gables International Plaza
2655 Le Jeune Road
Coral Gables, Florida 33134
(305) 446-2826

FL BAR NO.: 086117

* * *

ISSUE III

AN AWARD TO THE STATE OF 60% OF THE PUNITIVE DAMAGES IS UNCONSTITUTIONAL

Florida Statute Section 768.73(2), provides that in any civil action, an award of punitive damages shall be payable as follows: (a) 40% of the award shall be payable to the claimant, and (b) 60% of the award shall be payable either to the Public Medical Assistance Trust Fund or to the General

Revenue Fund of the State of Florida. The 60% award to the State provision is unconstitutional on its face, and in its application here.

That portion of the Statute making 60% of the punitive damage award payable to the State is unconstitutional. It is a brazen attempt, successful in the trial court, to pirate a portion of the Appellant's award without due process or compensation. It has long been the rule that a right to have punitive damages assessed is not a property right which is subject to constitutional protection, but when the Final Judgment is rendered which includes an award for punitive damages, it becomes a vested property right. *Ross v. Gore*, 48 So.2d 412 (Fla. 1950). Such vested property right cannot be constitutionally abrogated or taken away without due process.

The right of a citizen to hold property is a valuable right and one which the sovereign should not and cannot take without due process of law. There has been no due process of law in this instance since the State merely awaited the return of the jury's verdict, the entry of a Judgment on that verdict, including punitive damages, and after said Judgment had been appealed and affirmed by this Court, it then decided that it should have 60% of the punitive award.

The taking of property without due process was terminated more than 735 years ago in 1255, when King John of England permitted the ratification of the Magna Charta which guaranteed the property rights of an individual as well as his liberties. The rights granted by the Magna Charta as well as the Constitution of Florida and the United States, are now being diluted by the actions of an ill-informed legislature and its enforcement at the behest of power-seeking persons or corporate defendants bent on stripping away the rights of the citizenry.

Not only is the taking in this instance of the Appellant's award by the State unlawful, but it also amounts to appropriation by the State of the attorney's services and his work product. If this can be legally justified, then the State could require the farmer to deliver without compensation or appropriate legal proceedings, the second born of each of his cows. In short, we reach the old philosophy that the sovereign can do no wrong, and consequently, if it is done by the sovereign, the citizenry can have no legitimate objections or recourse to just compensation or to prevent the invasion of their property rights. To state the premise is to expose it to the constitutional defect inherent therein.

Once the claim for punitive damage has been reduced to judgment, it cannot be taken away by the legislature or the State, without in return giving the plaintiff a *quid pro quo*.

* * *

Although the appellate courts in Florida have not yet ruled on the constitutionality of *Florida Statutes Section 768.72(2)(b)*, a United States District Court in Georgia has declared a similar act governing punitive damages awards in products liability actions to be unconstitutional. In *McBride v. General Motors Corporation*, 737 F.Supp. 1563 (M.D. Ga. 1990), the Court held that the Georgia Tort Reform At, through its liability punitive damage subsection conferring upon the State a non-party judgment creditor status, and entitling the state to receive 75% of the punitive damage award, violated the excessive fines provision of the State and Federal Constitutions. *U.S.C.A. Const. Amend. 8; Ga. Const. Art. 1 #1, Par. 17.*

EFFECT OF EMINENT DOMAIN

The award of 60% of the punitive damages awarded to the Claimant by a Jury became the property of the Claimant

(and his attorney) when reduced to Final Judgment. The *Constitution of the State of Florida*, provides in *Article X, Section 6*, titled Eminent Domain, that no private property shall be taken except for a public purpose, and with *full compensation* therefore paid to each owner.

Every kind of property, both real and personal, within the jurisdiction of the State, is subject to the power of eminent domain, including intangible and incorporeal rights, such as contracts, causes of action, and patent rights. *21 Fla. Jur.2d "Eminent Domain" #257.* A Judgment is a property right. When, as here, the State seeks to take away 60% of the punitive damages award of the Final Judgment, then the State must pay full compensation therefore to the Claimant. However, neither the offending statute or the trial court's Order Amending Final Judgment, provides for the Claimant receiving his full compensation for the State taking away $307,200.00 of his property.

In addition to the aforementioned reasons for declaring the Statue to be unconstitutional, other reasons include the rewarding of the State at the expense of the Plaintiff and his attorney, the denial of the Plaintiff to full access to the Courts and the full benefits of a Jury Verdict, and the fact that the Statute is an arbitrary, capricious, and invalid exercise of the State's police power.

* * *

CONCLUSION

A Final Judgment in this case for compensatory and punitive damages was appealed to this Court, affirmed by this Court, and the Mandate of this Court was lodged with the trial court. Only after the conclusion of the cause in this Court did the State come in and attempt tc assert alleged rights un [sic] *Florida Statutes Section 768.73(2)(b)*, in its efforts to reclaim without compensation or due process the greater portion of the Appellant's punitive award. This Court should not permit the State in such a situation tc profit by such a flagrant disregard of the rights of one of its citizens. . . .

. . . .

The Order appealed should be reversed.

Respectfully submitted,

BERNARD B. WEKSLER, ESQ.
Attorney for Appellant
522 Gables International Plaza
2655 Le Jeune Road
Coral Gables, Florida 33134
(305) 446-2826

By: /s/ Bernard B. Weksler
BERNARD B. WEKSLER

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

CASE NO.: 90-2497

LOWER TRIBUNAL CASE NO.: 87-44067

HARVEY GORDON,

Appellant,

vs.

K-MART CORPORATION, DAVID SPARROCK, PETER MIRAMBEAU, and THE STATE OF FLORIDA,

Appellees.

REPLY BRIEF OF APPELLANT, HARVEY GORDON

BERNARD B. WEKSLER, ESQ.
Attorney for HARVEY GORDON
522 Gables International Plaza
2655 Le Jeune Road
Coral Gables, Florida 33134
(305) 446-2826
FL BAR NO.: 086117

* * *

III. *SECTION 768.73(2), FLORIDA STATUTES*, PERMITTING THE STATE TO OBTAIN 60% OF A PUNITIVE DAMAGES AWARD IS UNCONSTITUTIONAL.

. . . .

The exaction, taking away, improperly and unfairly taxing the Appellant the sum of $307,200.00, (60% of the punitive damages award), is an unlawful taking of his property without due process of law, violating the *Fifth Amendment to the United States Constitution*, and *Article*

X, Section 6 of the Florida Constitution. Private property shall not be taken except for a public purpose, and with full and just compensation. In addition, the taking is an arbitrary fine and unfair tax on a person injured by a tortfeasor who does not have to pay any money in excess of the punitive damages award to the State. The appellant is penalized — not the intentional tortfeasor. Furthermore, the exaction of 60% of the punitive damages award does not bear a rational or reasonable relationship to a legitimate State objective. *Belk-James, Inc. v. Nuzum*, 358 So.2d 174 (Fla. 1978).

The State further argues that the Appellant's reliance on *McBride v. General Motors Corp.*, 737 F.Supp. 1563 (M.D. Ga. 1990), finding the punitive damages provision of the Georgia Tort Reform Act unconstitutional, is misplaced. K-MART does not mention the *McBride* case at all. Although we can concede that Florida's Statute and Georgia's Statute might have some differences, i.e., Georgia exacted 75% of the punitive damages award less a proportionate part of the cost of litigation, including reasonable attorney's fees, as compared to Florida's exaction of 60% of the award, without any allowance for fees and costs, *both* States are in the United States. Both States are subject to the Constitutional provisions of the Fifth, Seventh, Eighth, and Fourteenth Amendments to the Constitution of the United States.

The *McBride* court found that the Georgia Tort Reform Act which arbitrarily and discriminatorily deprived a tort victim of the right to recover punitive damages, an element of damages which has been so long and universally recognized, was unconstitutional. The Georgia Act, as in the Florida Act, does not provide any *quid pro quo* to compensate the injured Plaintiff for that portion of the punitive damages award which the State of Florida is seeking to pirate away from him.

The constitutionality of *Florida Statute §768.73(2)(b)*, and *Florida Statute §768.73(4)*, was never questioned in the trial court prior to the October 9, 1990 Motion hearing. However, at the hearing, the Appellant's counsel specifically informed the trial court that Mr. Gordon would contest the constitutionality of the law with the State, if the State was permitted to intervene, or if the Final Judgment was amended. (App. 37, 38, 42, 46, 58, 59) The trial court proceeded to amend the Final Judgment without permitting the Appellant to establish the unconstitutionality of the Statutes, and the State's ability to intervene.

* * *

CONCLUSION

The trial court was in error in amending the affirmed Final Judgment after the Mandate was issued. In addition, the provisions of *Florida Statute §768.73(2)(b)*, and *Florida Statute §768.73(4)*, are unconstitutional and cannot be enforced. The Order Amending Final Judgment should be reversed with instructions to re-establish the Final Judgment of July 27, 1989.

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IN THE SUPREME COURT
OF FLORIDA
DISTRICT COURT OF APPEAL
THIRD DISTRICT NO.: 90-02497

CASE NO.: 78,638

HARVEY GORDON,

Petitioner,

vs.

STATE OF FLORIDA, et al.,

Respondent.

INITIAL BRIEF OF PETITIONER

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* * *

SUMMARY OF ARGUMENT

Section 768.73(2)(b) is unconstitutional and violates the Fifth and Fourteenth Amendments of the United States Constitution, and Article X, Section 6 of the Florida Constitution in taking private property for public use without full compensation paid to the Plaintiff who obtained a $512,000.00 punitive damages award and Judgment. *Section 768.73(2)(b)*, violates other constitutional rights, including the right of access to the courts to redress for injury, the inviolate right of trial by jury with the verdict free from substantial impairment, and the equal protection of the law.

* * *

ARGUMENT

I.

WHETHER SECTION 768.73(2)(b), FLORIDA STATUTE (SUPP. 1986), PROVIDING FOR THE STATE OF FLORIDA TO OBTAIN AND TAKE 60% OF A PUNITIVE DAMAGES AWARD IS CONSTITUTIONAL?

. . . .

Section 768.73(2)(b), has effectuated a forced taking of HARVEY GORDON'S $307,200.00 property interest in the award and judgment, and does so in a manner and degree unrelated to any constitutionally permissible governmental interest served by the taking and, therefore, violates the federal and state constitutional proscriptions against the taking of private property without just or any compensation.

U.S. Constitution Amendments V and XIV; Florida Constitution Article X, Section 6.[4]

. . . .

The taking clause of both the Federal and State Constitutions is, "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole". *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 at 123; 98 S.Ct. 2646 (1978). Resolving the question of "what constitutes a taking" is a problem of considerable difficulty, and courts have been unable, "to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons". *Id.* at 124. When governmental regulation, "goes too far it will be recognized as a taking". *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 St. 158 (1922).

The definition of "property" is broad enough in condemnation cases to extend to intangible and incorporeal rights such as contractual rights and leasehold interests, *Pinellas County v. Brown*, 450 So.2d 240, 242 (Fla. 2d DCA 1984) and should extend to jury verdicts and awards, as well as to judgments. It has long been established in Florida that the prohibition against the taking of private property

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[4]The Fifth Amendment to the United States Constitution provides in part:

... nor shall private property be taken for public use, without just compensation.

This amendment is made applicable to the states through the due process clause of the Fourteenth Amendment. *Chicago, Burlington, and Quincy R.R. Co., v. Chicago*, 166 U.S. 226 17 S.Ct. 581 (1897).

. . . .

without just compensation is not limited to the taking of property under the right of eminent domain. *State Plant Board v. Smith*, 110 So.2d 401, 405 (Fla. 1959).

The right of a citizen to hold property is a valuable right and one which the sovereign should not and cannot take without compensations and due process of law. There has been no due process of law in this case since the State merely awaited the return of the jury's verdict (after two Assistant State Attorneys testified on behalf of and in aid of K-MART), the entry of a judgment including punitive damages following the verdict, failed to participate with the Plaintiff in defending against an appeal, did not contribute to the Plaintiff's costs and fees, and then only after the Final Judgment had been affirmed, decided it should intervene and take away 60% of the punitive damages award for the State — all without compensation to the Plaintiff.[6]

UNCONSTITUTIONAL TAKING OF PROPERTY WITHOUT DUE PROCESS

The determination of whether a "taking" has occurred by reason of a governmental regulation interfering with or impairing the interest of a private property owner involves essentially an "ad hoc, factual" analysis. *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S.Ct. 383 (1979). In resolving a "taking" issue, the United States Supreme Court has considered the totality of circumstances underlying the taking, including such factors as the character of the governmental action, its economic impact, and its interference with reasonable economic expectations of the

[6]The State knew about the jury verdict as it was well publicized. See Miami Herald article of July 27, 1989. (R. 21) Why did not K-MART notify the State about the jury verdict before any Judgment was entered? Because neither K-MART nor the State were interested in having the State enter into the case to assist the Plaintiff in sustaining the punitive damages award!

property owner. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83, 100 S.Ct. 2035 (1980).

An additional factor, and one entitled to considerable weight, is whether the property right has ripened into a judgment. In *Ross v. Gore*, 48 So.2d 412 (Fla. 1950), a libel case, this Court held that the right to have punitive damages assessed is not property, and that until a judgment is rendered, there is no vested right in a claim for punitive damages. However, in the case at bar, a judgment *was* rendered giving GORDON a vested right in the punitive damages award. Such vested property right cannot be constitutionally abrogated or taken away without due process and full compensation. The Judgment was not void, although as we have seen, the trial court *amended* the Judgment.

. . . .

* * *

TWO OTHER STATES HAVE DECIDED THAT THEIR PUNITIVE DAMAGES SHARING STATUTES [SIC] ARE UNCONSTITUTIONAL

The District Court referred to the case of *McBride v. General Motors Corp.*, 737 F.Supp. 1563, 1578 (M.D. Ga. 1990), deciding the Georgia punitive damages sharing act unconstitutional, but ridiculed the court's discussion as "completely unpersuasive". (R. 78, footnote 9) In another footnote, the District Court referred to several other states having enacted statutes similar to Florida. (R. 75) As of this writing, two states have declared their "similar" statutes unconstitutional.

Two months ago, the Colorado Supreme Court in *Kirk v. The Denver Publishing Co.*, ____, P.2d ____, (Colo. 1991), Case No. 88SA 405, concluded that Colo. Rev. Stat. §13-21-102(4) (1987) requiring a party receiving an exemplary damages award to pay one-third of all such "damages collected ... into the state general fund" to be unconstitutional. The court held that the statute:

> "effectuates a forced taking of the judgment creditor's property interest in the judgment and does so in a manner and to a degree unrelated to any constitutionally permissible governmental interest served by the taking and, therefore, violates the federal and state constitutional proscriptions against the taking of private property without just compensation."

In Georgia, the United States District Court, in *McBride v. General Motors Corp.*, supra, ruled that Ga. Code Ann. §51-12-5.1(e)(2) (Suppl. 1987), was unconstitutional. Although our Third District Court of Appeal dismissed the *McBride* case and discussion as "completely unpersuasive" (Footnote 9; R. 78), the *McBride* case did find that the Georgia Tort Reform Act, through product liability punitive damage subsection conferring upon the State a *non party* judgment creditor status and entitling the State to receive 75% of the punitive damage award, violated the excessive fines provision of state and federal Constitutions. *McBride* further held that the punitive damages provision created an arbitrary and unreasonable classification between products liability tort plaintiffs and other tort plaintiffs, and that the statute authorizing the state to recover 75% of the punitive damages award was a *revenue producing* measure and unconstitutional.

. . . .

* * *

CONCLUSION

It is clear that *Section 768.73(2)(b)* is not in any way designed to promote the people's health, safety, or welfare, and bears no reasonable relationship to the Statute's avowed liability insurance purposes, and must be overturned, on constitutional due process and all of the other constitutional grounds stated herein.

. . . .

... The decision of the District Court of Appeal should be quashed with direction that on remand the trial court's Final Judgment of July 27, 1989 be reinstated.

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IN THE SUPREME COURT OF FLORIDA

CASE NO.: 78,638

FLA. SUPREME COURT

HARVEY GORDON,

Petitioner,

vs.

STATE OF FLORIDA, K-MART CORPORATION, et al.,

Respondents.

AMENDED REPLY BRIEF OF PETITIONER

On Discretionary Review From the
District Court of Appeal, Third
District Case No. 90-02497.

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* * *

ARGUMENT

I.

SECTION 768.73(2), FLORIDA STATUTES, TAKING FOR THE STATE 60% OF A PUNITIVE DAMAGES AWARD IS UNCONSTITUTIONAL

. . . .

* * *

Section 768.73(2), is also unconstitutional by virtue of violations of the Due Process clauses of Article I, Section 9 of the Florida Constitution, and of the Fourteenth Amendment of the United States Constitution. . . .

. . . .

* * *

The injured Petitioner, HARVEY GORDON, and all other persons similarly situated, have been treated by the Legislature in a fundamentally unfair manner by the enactment of *Section 768.73(2)*, in derogation of their *substantive rights*, and the basic constitutional guarantees of due process, access to the courts, payment of just compensation when the STATE takes away 60% of the punitive damages award, the right to an inviolate jury trial by a jury with full knowledge of *Section 768.73(2), Florida Statutes*, and the equal protection of the laws.

The STATE OF FLORIDA and the Amici Curiae attempted to gloss over the two decisions rendered by other State tribunals declaring their punitive damages sharing statutes to be unconstitutional. A Georgia United States District Court decision is *Mc Bride [sic] v. General Motors*

Corp., 737 F.Supp. 1563, 1578 (M.D. Ga. 1990), found that the Georgia Statute conferring upon the State a *non-party* judgment creditor status and entitling the state to receive 75% of the punitive damages award, violated the excessive fines provision of the State and Federal Constitutions. The District Court opined that revenue was incidental, and that the Statute was arbitrary, unreasonable, and designed to restrict injured Plaintiffs of an incentive to bring actions to punish, penalize, and deter egregious business practices.

In *Kirk v. Denver Publishing Co.*, 818 P.2d 262 (Colo. 1991), the Colorado Supreme Court decided that a Colorado Statute requiring a party receiving an exemplary damages award to pay one-third of the award into the State General Fund effected an unconstitutional taking of private property without just compensation. The Statute did not qualify as a valid penalty or forfeiture, an ad valorem property tax, an excise tax, or a user fee. Further, the Statute required the General Fund payment without conferring on the judgment creditor any benefit or service not furnished to other civil litigants who were not required to make the same payment.

. . . .

* * *

III.

SECTION 768.73(4), FLORIDA STATUTES LIMITING THE PLAINTIFF'S ATTORNEY'S FEES TO BE CALCULATED ONLY ON THE 40% PORTION OF THE PUNITIVE DAMAGES AWARD AND NOT TO BE PAYABLE FROM THE STATE'S 60% SHARE, IS UNCONSTITUTIONAL

. . . .

* * *

The denial of an attorney's fee on $307,200.00 (60% of the $512,000.00 punitive damages award), is a fine on the attorney, and is an excessive fine in violation of the Excessive Fines Clause of the *United States Constitution*, and Section 17 of the Declaration of Rights of the Florida Constitution.

In *Browning-Ferris Industries v. Kelco Disposal, Inc.*, U.S. 237, 109 S.Ct. 2909, 106 L.Ed.2d 919 (1988), the Supreme Court held that the Eighth Amendment's excessive-fines clause was not applicable to punitive damage awards in civil cases where the government "*neither has prosecuted the action nor has any right to receive a share of the damages awarded*". *Ibid* at 2914. The Supreme Court left open the question of whether punitive damages are subject to the excessive fines limitations when a state government, as in this case, shares in the recovery. Now that the STATE OF FLORIDA has a statutory right to receive a 60% share of the punitive damages awarded, the Excessive-fines Clause is applicable. The Plaintiff's attorney is the one who is paying or suffering the excessive-fine. The Legislature cannot arbitrarily and discriminatorily deprive the attorney (or his client) of his right to his fee, by excessively fining him 40% or 45% of $307,200.00.

CONCLUSION

An award of punitive damages is a substantive right. The original Judgment was a property right. *Section 768.73(2), Florida Statutes*, has unconstitutionally taken away, without full compensation, the Petitioner's substantive and property right.

. . . .

WHEREFORE, the decision of the Third District Court of Appeal should be disapproved, the Order Amending Final Judgment entered on October 9, 1990, be reversed, and the original Final Judgment of July 27, 1989 be reinstated consistent with the Jury verdict and the Constitution of the United States of America and the State of Florida.

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